Supreme Court U.S.
FILED

No. 06-408

IN THE

Supreme Court of the United States

ACACIA MORTGAGE CORPORATION,

Petitioner,

v.

RODNEY L. JOFFE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF ARIZONA, DIVISION ONE

BRIEF IN OPPOSITION

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INTRODUCTION

Petitioner Acacia Mortgage Corporation ("Acacia") has presented no "compelling reasons" for their Petition for a Writ of Certiorari ("Petition") to be granted. This case involves the application of the Telephone Consumer Protection Act ("TCPA"), codified at 47 U.S.C. § 227 *et seq.*, to Acacia's admitted conduct. Acacia programed its computer to send promotional e-mail messages to cell phone users, knowing with absolute certainty that these messages would reach their targets and result in cell phone calls. When Respondent Rodney Joffe's ("Joffe") cell phone rang on January 6, 2001, and again on March 21, 2001, he unhappily discovered that Acacia was sending its intrusive text messages to his cell phone. [Pet. App. at 2a] When Acacia brazenly refused to stop sending these messages, Mr. Joffe filed suit.

This case is not now, nor has it ever been, about the applicability of the TCPA to e-mails sent to computers. Acacia knew that its promotional text messages would not end up on Mr. Joffe's personal computer as e-mails.[1] Acacia knew this because its text messages were sent to an e-mail address comprised primarily of Mr. Joffe's cell phone number, 6024186471@att.net. Although initiated as e-mails, Acacia also knew that Mr. Joffe's cellular telephone provider would convert them into text messages that would be delivered

1. The text messages Acacia sent to Mr. Joffe's cell phone are known as "SMS messages." An SMS message is a text message "directed to [a] wireless devic[e] through the use of the telephone number assigned to the device." [Pet. App. 13a] An SMS Message may be transmitted phone-to-phone or, as Acacia did to Mr. Joffe, Internet-to-phone. [*Id.*] An Internet-to-phone text message is initially delivered over the Internet as an e-mail directed to an e-mail address assigned by a cellular telephone carrier to a subscriber. [*Id.* at 13a-14a] When the e-mail reaches the e-mail address, it is converted automatically by the carrier into a different format that can be transmitted to the customer's cellular telephone." [*Id.* at 15a]

directly to Mr. Joffe's cellular telephone as calls. Acacia knew that Mr. Joffe was not going to receive its promotional messages by accessing his personal computer e-mail account via his cell phone. Instead, they were going to be foisted upon Mr. Joffe surreptitiously in the form of text message phone calls, just as Acacia intended. As the court of appeals described it, "Acacia co-opted the SMS service offered by Joffe's carrier to deliver SMS text messages to Joffe by telephone." [Pet. App. 17a]

Acacia's argument that it only sent e-mails to Mr. Joffe and did not make any "calls" elevates form over substance. Far from "ignoring" the plain meaning of the TCPA and expanding it into something Congress never intended, the trial court applied the letter and spirit of the law to Acacia's admitted conduct. In an 11-page published decision, a unanimous court of appeals affirmed. *See Joffe v. Acacia Mortgage Corp.*, 462 Ariz. Adv. Rep. 38, 121 P.3d 831 (2005) ("Opinion") [Pet. App. 1a - 29a]

The court of appeals based its decision on a thorough review of the legislative history of the TCPA, the FCC rules and regulations implementing the TCPA, and a textual analysis of the TCPA. After systematically addressing all of the elements necessary to establish a TCPA violation, the court of appeals concluded that Mr. Joffe satisfied those requirements. The Arizona supreme court declined to review the court of appeals' decision, and Acacia subsequently filed its Petition for a Writ of Certiorari with this Court.

Although the court of appeals correctly decided the legal issues, this Court does not need to reach the merits of the case in order to conclude that the Petition should not be granted. As detailed below, the Opinion does not have prospective application (the calls Acacia made are now governed by a completely different statutory scheme) and the limitations period for bringing claims under the TCPA for using an autodialer to send text messages to cell phone

users is closing. With such limited application, the Court would be constrained to conclude that this case involves an "important issue."

Simply put, Petitioner has failed completely to carry its burden of demonstrating that there are compelling reasons for this Court to grant the Petition.

STATEMENT OF THE CASE

Respondent generally adopts as its statement the Arizona court of appeals' recitation of the background facts. [Pet. App. at 1a-5a]

REASONS FOR DENYING THE PETITION

I. This Case Does Not Involve An "Important Issue." Calls Such As The Ones Acacia Made To Mr. Joffe's Cell Phone Are Now Governed By The CAN-SPAM Act, And The Limitations Period For Bringing Claims Under The TCPA For Such Calls Is Closing

Referencing the number of times the TCPA has been the subject of judicial decisions, law review articles and trade publications, together with the fact that this case is one of first impression, Acacia contends that this case involves "an important issue of first impression regarding the operation of a federal statute." [Petition at 6] Acacia is mistaken.

Since January 1, 2004, calls such as the ones Acacia made to Mr. Joffe's cell phone are governed by the CAN-SPAM Act. The court of appeals interpreted an entirely different statute (the TCPA) and held that calls such as the ones made by Acacia to Mr. Joffe's cell phone violate the TCPA. Further, the limitations period for asserting claims based on calls that were made before the CAN-SPAM Act went into effect is rapidly closing.[2] Because

2. When a federal statute does not contain a built-in statute of limitations, the four-year statute of limitations under 28 U.S.C. § 1658 applies.

the court of appeals Opinion does not apply to the existing regulatory scheme for such calls, and since the class of plaintiffs that may still assert claims under the TCPA is dwindling, the case is one of obvious limited significance. The Petition should denied for this reason alone.

II. The Court of Appeals Opinion Does Not Threaten To "Interfere" With Congress' "Carefully-Designed Regulatory Scheme"

Acacia is obviously free to challenge the Opinion on the basis that its conduct is not covered by the TCPA or that the interpretation given to the TCPA by the court of appeals runs afoul of the First Amendment. However, Acacia's assertion that the Opinion "interferes with Congress's attempt to regulate carefully and deliberately in the field of commercial communication" [Petition at 8] is so misplaced that one can only wonder why it is being made at all.

Effective January 1, 2004, calls such as the ones Acacia made to Mr. Joffe are governed by the CAN-SPAM Act. The unwanted calls Acacia made to Mr. Joffe ' cell phone all occurred before January 1, 2004. The court of appeals held that the calls Acacia made to Mr. Joffe, all of which occurred prior to January 1, 2004, violate the TCPA. The Opinion does not have prospective application and has no impact whatsoever on the CAN-SPAM Act. Since the Opinion does not apply to calls governed by the CAN-SPAM ACT, it can hardly "interfere" with it.

III. The Court Of Appeals Correctly Concluded That Acacia Made Prohibited "Calls" To Mr. Joffe

A. The TCPA

By concluding that the TCPA prohibits telemarketers from sending commercial text messages to cell phone users such as Mr. Joffe, the court of appeals properly applied the letter and spirit of the law.

Enacted in 1991 as part of the Federal Communication Act, the TCPA seeks to deal with an increasing common nuisance — telemarketing. *See Erienet, Inc. v. Velocity Net, Inc.*, 156 F.3d 513, 514 (3rd Cir. 1998). The TCPA prohibits various uses of automatic telephone dialing systems, live unwanted commercial telephone solicitation, and the use of any device to send an unsolicited advertisement to a telephone facsimile machine. *Id.* The statute creates a private right of action against any person that violates its provisions. 47 U.S.C. § 227(b)(3). The TCPA is a strict liability statute, pursuant to which a plaintiff can recover actual damages or statutory damages of $500 per violation, whichever is greater. 47 U.S.C.§ 227(b)(3). If the violation was done "willfully" or "knowingly," the court may treble the damages. *Id.*

B. Its Purpose

A central purpose of the TCPA is to prevent advertisers from shifting costs to recipients of unwanted solicitations, *see* H.R. Report No. 317, 102nd Cong., 1st Sess. 25 (1991), to protect consumers from unwanted telephone solicitation, *see id.*, and to facilitate interstate commerce by restricting certain uses of facsimile (fax) machines and automatic dialers. *See* 47 U.S.C.A. § 227. Congress articulated another important purpose – the risk to public safety when an emergency line is seized by telemarketers.

The TCPA also furthers another important interest — the right to be left alone. *See* Rita Marie Cain, *Call Up Someone and Just Say "Buy" — Telemarketing and the Regulatory Environment*, 31 Am. Bus. L.J. 641, 649 (1994); *see also* U.S.C.C.A.N. 1968, 1979, accompanying S.1462 ("this legislation is designed for the laudable purpose of protecting the privacy rights of telephone users.") (President Bush); *Szefczek v. Hillsborough Beacon*, 668 A.2d 1099, 1108 (N.J. Super. 1995) (same). The TCPA's Author, Senator Hollings, aptly addressed the privacy concerns underlying the TCPA:

> Mr. President, I rise today to urge the Senate to approve S. 1462, the Automated Telephone Consumer Protection Act. The substitute amendment before the Senate addresses an enormous public nuisance. Computerized telephone calls are invading our homes and destroying our privacy. Consumers around the country are crying out for Congress to put a stop to these computerized telephone calls. Congress has a clear opportunity to protect the interests of our citizens, and we should not pass up this chance. Computerized calls are the scourge of modern civilization. They wake us up in the morning; they interrupt our dinner at night; they force the sick and elderly out of bed; they hound us until we want to rip the telephone right out of the wall. Even more important, these computerized telephone calls threaten our personal health and safety .. . Computerized calls tie up the emergency line of police, fire, and medical services and prevent real emergency calls from getting through. These machines are out of control, and their use is growing by 30 percent every year. It is telephone terrorism, and it has got to stop.

137 Cong. Rec. S16204-01, S16205.

C. Its Reach

1. The TCPA's Ban On the Use Of Automatic Telephone Dialing Systems For Calling Cellular Phone Users

Mr. Joffe's claims are based upon Section 227(b)(1)(A)(iii) of the TCPA, which makes it unlawful for any person within the United States to:

> make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any

> automatic telephone dialing system[3] or an artificial or prerecorded voice ... to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the party is charged for the call.

47 U.S.C. § 227(b)(1)(A)(iii).

2. The FCC Regulations Implementing The TCPA

The FCC has issued the following regulation regarding the use of automatic telephone dialing systems:

> (a) No person may:
>
> > (1) Initiate any telephone call (other than a call made for emergency purposes or made with the prior express consent of the called party) using an automatic telephone dialing system or an artificial or prerecorded voice,
> >
> > > (iii) To any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call;

47 C.F.R. § 64.1200(a)(1)(iii).

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3. Acacia does not challenge the court of appeals' conclusion that the computer Acacia used to send its text messages to Mr. Joffe's cell phone fits within the statutory definition of an "automatic telephone dialing system" under Section 227(a)(1) of the TCPA.

IV. Acacia's Admitted Activities Are Governed By The TCPA

A. Acacia "Initiated" Prohibited Telephone Calls To Mr. Joffe's Cellular Telephone

The TCPA is not limited to those who actually dial phone numbers or make telephone calls. Rather, it includes those who "initiate" a "telephone call" or "message" for the purpose of engaging in prohibited telemarketing activities. 47 C.F.R. § 64.1200(a)(1)(iii). The TCPA does not define the word "initiate." However, its meaning cannot reasonably or logically be interpreted to cover only the act of dialing telephone numbers or making telephone calls.

A cardinal principle of statutory construction requires a court to interpret a statute, whenever possible, so that no clause, sentence, or word is rendered superfluous, void, contradictory, or insignificant. *E.g.*, *Samsel v. Allstate Ins. Co.*, 199 Ariz. 480, 483, 19 P.3d 621, 624 (App. 2001). To interpret the statute as proscribing only the act of physically dialing telephone numbers or making telephone calls would render superfluous the text of the statute, which not only prohibits any person from engaging in such activities, but also from "initiating" them.

Another well known cannon of statutory construction is that the plain meaning of words is to be given to a statute when construing its terms. This familiar cannon applies to the TCPA. *Autoplex Leasing, Inc. v. Mfr.*, 16 S.W.2d 815, 817 (Tx. App. 2000); *Zelma v. Total Remodeling, Inc.*, 756 A.2d 1091, 1093 (N.J. Super. 2000). While no Arizona court has been asked to construe the TCPA, it is clear that an Arizona court would apply the same principles of statutory construction. *See HCZ Const., Inc. v. First Franklin Financial Corp.*, 199 Ariz. 361, 364, 18 P.3d 155, 158 (App. 2001) (words are given their ordinary meaning unless the context of the statute requires otherwise). Indeed, the

preferred approach in Arizona is to apply the ordinary meaning of the word found in well-respected dictionaries. *See Snyder v. Tucson Police Pub. Safety*, 201 Ariz. 137, 140, 32 P.3d 420, 423 (applying definitions found in Webster's Third New Int'l Dictionary and Black's Law Dictionary); *see also State v. James*, 141 Ariz. 141, 144, 685 P.2d 1293, 1296 (applying the word "initiate" in the context of an accused's right to counsel in its "ordinary dictionary sense").

Webster's defines "initiate" as "to begin, set going, or originate: to initiate major social reforms." Random House Webster's College Dictionary 678 (2nd ed. 1999). The word "initiate" is defined in Black's Law Dictionary as "commence; start; originate; introduce; inchoate." Black's Law Dictionary 705 (6th ed. 1990). "Initiation of proceedings" is defined as: "[T]he person who sets the machinery of the law in motion, whether he acts in his own name or in that of a third person." Restatement (Second) of Torts § 674 cmt. A.

By sending an e-mail to a known 9 digit cell phone number beginning with Area Code 602, Acacia placed into motion a course of events which was certain, and known to be certain, to result in a phone call. Under any reasonable definition, Acacia "initiated" phone calls to Mr. Joffe's cell phone.

B. The Person Or Entity "On Whose Behalf" Prohibited Calls Are Made Are Liable Under the TCPA

The TCPA applies not only to the entity making or "initiating" prohibited calls, but also to any entity "on whose behalf" such calls are made. *Worsham v. Nationwide Ins. Co.*, 772 A.2d 868, 878 (Md. 2001) (citing 47 U.S.C. § 227(c)(5) (providing private remedy for repeat calls "made by or on behalf" of the same entity).

Acacia cannot reasonably deny that the promotional phone calls Mr. Joffe received were made on its behalf. Simply put, Acacia cannot escape liability under the TCPA by asserting that it did not itself dial telephone numbers or make phone calls.

C. The Ban On The Use Automatic Telephone Dialing Systems To Make Calls To Cellular Telephones Cannot Reasonably Be Construed To Extend Only To Calls Which Involve "The Transmission Of Voice Or Sound"

Acacia erroneously contends that a prohibited "call" under the TCPA requires "the transmission of voice or sound." [Petition at 10] Acacia's flawed interpretation directly conflicts with FCC rules and regulations implementing the TCPA. It is also an internally inconsistent and demonstrably incorrect.

1. Acacia's Position Is Contrary To FCC Rules and Regulations Interpreting the TCPA

After the enactment of the CAN-SPAM Act, the FCC issued an Order which provides that auto-dialed phone-to-phone text messages ("SMS messages") would continue to be covered by the TCPA while SMS messages sent to cell phones through the Internet would be covered by the CAN-SPAM Act. *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, FCC Report and Order, 18 F.C.C.R. 14, ¶ 165 (Jul. 3, 2003). If, as Acacia contends, the TCPA only applies to calls which involve "the transmission of voice or sound," SMS messages would not be covered by the TCPA. As SMS messages *are* covered by the TCPA, Acacia's position cannot possibly be correct.

For the same reason, Acacia's contention that the Opinion "interferes with Congress's attempt to regulate carefully and

deliberately in the field of commercial communication" [Petition at 8] is equally misplaced. It is this very same "carefully" regulatory scheme that expressly defines a "call" under the TCPA (in the TCPA Order discussed above) to include pure text messages.

2. Acacia's Unreasonable Interpretation Of The TCPA

For many reasons, the construction of the word "call" cannot reasonably be limited to "voice" transmissions under the TCPA. The drafter's of the TCPA carefully chose to use the word "voice" throughout the statute.[4] If the drafters wanted the word "call" to be limited to "voice" communications, they could have, and presumably would have, done so. *Fernandez v. Brock*, 840 F.2d 622, 632 (9th Cir. 1988); *In re Pudgie's Development of NY, Inc.*, 239 B.R. 688, 695 (S.D.N.Y. 1999); *Hirschey v. F.E.R.C.*, 760 F.2d 305, 308 ("Congress knew how to use words of limitation when they were intended"); *Grado v. Gross*, 1984 WL 2467, *6 (D. Mass. 1984) ("It is worth noting that Congress knew how to use this word, in this statute, when it wished to."); *United States v. Donovan*, 429 U.S. 413, 445 (1977) ("Since Congress demonstrably knew how to use other language when it so chose, I would take Congress at its word and not try to "improve" on its draftsmanship.") (Brennan, J., concurring).

Moreover, Acacia's interpretation of the TCPA contravenes established principles of statutory construction and is unreasonable. Consumer protection legislation, such as the TCPA, are remedial statutes that "are broadly construed to effectuate their purpose and to promote justice." *E.g.*, *Parkhill v. Minnesota Mut. Life Ins. Co.*, 995 F. Supp. 983, 998 (D. Minn. 1998); *Sellinger v. Freeway Mobile Home Sales, Inc.*, 110 Ariz. 573, 576, 521 P.2d 1119, 1122 (1974);

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4. In fact, the word "voice" appears six times in the statute.

Johnson v. McCrackin-Sturman Ford, Inc., 527 F.2d 257, 262 (3rd Cir. 1975); *Thomas v. Myers-Dickson Furniture Co.*, 479 F.2d 740, 748 (5th Cir. 1973); *cf Stainless Specialty Mfg. Co. v. Industrial Com'n of Arizona*, 144 Ariz. 12, 16, 695 P.2d 261, 265 (1985) (construing no-fault workers' compensation statute to give effect to its remedial purpose); *see also Scarborough v. Atlantic Coast Line R. Co.*, 178 F.2d 253, 258 (4th Cir. 1950) (consumer protection statutes "should be liberally construed and interpreted in a manner tending to discourage attempted evasions by wrongdoers"); *Hogar Agua v Vida En El Desierto, Inc.*, 36 F.3d 177, 182 (1st Cir. 1994) (exemptions from the requirements of remedial statutes are to be construed narrowly to limit exemption eligibility); *Georgia Pub. Serv. Com'n v. ALLTEL Georgia Communications Corp.*, 489 S.E.2d 350, 387 (Ga. App. 1997) ("Construction of a statute must square with common sense and reasoning. . . . We are not prone to condone the intentional [or inadvertent but flagrant] circumvention of the clear legislative purpose of protective statutes.")

As stated above, a central purpose of the TCPA is to protect consumers against unwanted telephone solicitations and to prevent such solicitors from shifting advertising costs to the consumer. To exempt text message solicitations sent to cell phone users because they are not "voice" communications, knowing that the consumer's phone will ring and that the consumer will be charged for the call, would be to disregard the purpose of the statute.

Courts also avoid construing statutes in such as way as to elevate form over substance, thus defeating the purpose of the statute. *See Gregory v. Helvering*, 293 U.S. 465, 470 (1935) (rejecting statutory interpretation that "exalt[s] artifice above reality and . . . deprive[s] the statutory provision in question of all serious purpose."); *Clark v. Rent-It-Corp.*, 685 F.2d 245, 248 (8th Cir. 1982) (stating that the Truth In Lending Act "is remedial in nature, and the substance rather than the form of credit transactions should be examined in

cases arising under it"); *Turner v. E-Z Check Cashing of Cookeville, TN, Inc.*, 35 F. Supp.2d 1042, 1047 (M.D. Tenn. 1999) (Congress' intent to preempt all equivalent state causes of action should not be defeated by a triumph of form over substance); *Baker v. Citibank (South Dakota) N.A.*, 13 F. Supp.2d 1037, 1046 (S.D. Cal. 1998) (rejecting statutory interpretation that "circumvents the statute's obvious purpose of protecting consumers). As one federal court put it, "[I]f it walks like a duck, quacks like a duck, and looks like a duck, then it's a duck." *BMC Ind., Inc. v. Barth Ind., Inc.*, 160 F.3d 1322, 1337 (11th Cir. 1998).

To accept Acacia's unreasonable interpretation would not only elevate form over substance, but would also circumvent the express legislative intent of Congress to protect consumers from unwanted telephone solicitation and the cost-shifting associated with such calls.

Further, with the advent of flat rate plans for cell phone users, more consumers are using their cell phones not only as their primary phones, but as their only ones. *See Union Ink Co., Inc. v. AT &T Corp.*, 801 A.2d 361 (N.J. Super. Ct. 2002). In fact, the United States Telecom Association reports that "1 in 5 Americans consider their cell phones as their primary phones." David Cohen & Edward D. Kania, *The Future of the Communications Industry: New Products, New Services, the Need For New Regulatory Paradigms*, 13 Comm Law Conspectus 1, 4 (2005). In addition, "it is estimated that 38% of Americans are considering making wireless their only phone service." Nicole B. Stach, *Wireless Local Number Portability and Its Effect On Competition: Can There Be Too Much of a Good Thing?*, 12 Comm Law Conspectus 223, 234 (2004) (quoting Barry M. Aarons, *Does Phone Competition Still Matter?*, Consumers' Res. Mag., Apr. 1, 2003, at 24 (describing the current status of telephony in the United States). One of the primary purposes of the Act — the right to be left alone in the home — would not be

furthered if the prohibition against the use of automatic telephone dialing systems applied only to individuals lucky enough to retain traditional land-based telephone service.

Moreover, courts often construe statutes broadly in order to take into consideration modern advances in technology. It is for this reason that the FCC issued an order stating, among other things, that Congress could not have intended to allow easy circumvention of the prohibitions of the TCPA due to technological advances. In response to a request to clarify whether "fax modem boards" are the functional equivalent of "telephone facsimile machines," the FCC stated:

> the purpose of the requirement that facsimile machines have the capability to identify automatically senders or facsimile messages is to ensure that the requirement that all facsimile transmissions have identifying information is not circumvented. Congress could not have intended to allow easy circumvention of its prohibition on facsimile advertisements by simply using a computer to send a facsimile rather than a stand-alone facsimile machine.
>
> * * *
>
> The question of whether the definition of telephone facsimile machine includes fax boards is a matter of statutory interpretation that falls squarely within the scope of this proceeding. The statute is ambiguous with respect to this question and the legislative history provides no guidance. The manufacturing requirements in Section 227(d)(2) does not specifically address manufacturing of fax modem boards. Nevertheless, it is reasonable to conclude that Congress would not apply different manufacturing requirements to different devices whose users are subject to the same technical

> marking standards. Facsimile modem boards manufacturers are clearly able to provide automatic identification capability in their devices. There is no public policy served by interpreting the statutory ambiguity so as to exclude facsimile modem boards from the manufacturing requirement. We should resolve this issue in favor of a consistent approach for similar devices.

10 FCC Rcd 12391, 78 Rad. Reg.2d (P&F) 1258 (1995) (emphasis in original).

Cases in which courts have interpreted statutes broadly to take into consideration technological advances are legion. A notable example involves the admissibility of infrared spectroscopy tests, where statutes make admissible only chemical tests used to determine blood alcohol level. In the seminal decision regarding the admissibility of such test, the court held:

> To adopt the defendant's position [that only tests using chemicals to analyze breath are "chemical tests" within the statute] would be to bind inflexibly the administration of justice to the level of technology extant at the time of the enactment of the statute while technological advances thereafter would be unavailable to law enforcement officials if they did not fall within the terminology of a dated statute. If such a result is not required, it ought not to be adopted.

State v. Squires, 426 S.E.2d 738, 740 (S.C. 1992) (quoting *People v. Jones*, 461 N.Y.S.2d 962 (1983).

Interpreting statutes to take into account technological advances are common in the telecommunications industry. E.g., *Minn. Microwave*, 190 N.W.2d 661, 666 (Minn. 1971) ("It is not disputed that the grant of jurisdiction made to the

commission in 1915 can properly take account of and regulate changes on telephone service brought about by mere changes in the state of the art of telephony."); *Digital Paging Sys., Inc. v. Pub. Serv. Comm'n*, 360 N.Y.S.2d 931, 934-35 (App. 1974) (accepting the commission's conclusion that "the statutory definitions of 'telephone line' and 'telephone corporation' were legislatively drafted in broad enough terms to include technological advances in the telephonic communications industry" and that paging services were a type of telephonic communication); *Radio-Fone*, 193 N.W.2d at 447 (determining that the holder of a government issued certificate to provide "telephone service" authorizes the holder to use "new and improved devices and methods for telephonic communication" including non-wire mobile phone service). Thus, the term "call" should be defined with the view that Congress expected the TCPA to take into consideration technological advancements in telephonic communication, and not telephone services as conducted in 1991, the year the TCPA was enacted.

While text messaging technology may not have been widely available when the TCPA was enacted in 1991, the drafters wisely chose not to limit the reach of the statute to "calls" capable of communicating "two-way communications" or "voice" messages. Instead, Congress recognized that when a telephone rings, a "call" has been made. Common sense examples include:

- If a phone rings but the person does not answer it, he knows he received a call.
- If a person programs a phone to make a distinctive sound when another person calls, and the called party hears that distinctive sound when her phone rings, she knows the other person called even though she did not answer the phone.
- If a person agrees with another person that three rings indicates that the other person has arrived, and his

phone rings three times at the appointed time, he knows not only that the other person has arrived, but also that he received a call.

- If a person makes numerous calls to another person and that person does not answer the phone, she may tell the other person the following day that, "I called you on the telephone all night."

None of these examples involve "two-way communications," let alone a "voice" communications. Yet, a phone call was unquestionably made in each example under the ordinary meaning of the phrase "telephone call." Adopting Acacia's strained interpretation would also lead to bizarre, and clearly unintended, results. For example, if the definition of the word "call" required a "voice" communication, telemarketers could barrage the deaf and hearing impaired with uninvited telephone solicitations with impunity.[5]

3. Acacia's Position Is Contrary To Decisional Law

A recent TCPA decision confirms that a prohibited call does not require "two-way" communication, let alone a "voice" communication . In *Irvine v. Akron Beacon Journal*, 770 N.E.2d 1105 (Ohio Ct. App. 2002), the Ohio court of appeals held that hang-up calls that were placed by an automated dialing machine for the sole purpose of detecting recently connected telephone numbers so that the telemarketer could generate a list of numbers to be called in the future constituted a "call" under the TCPA. *Id.* at p. 1118.

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5. For example, a "TDD" machine allows a deaf person to conduct a telephone conversation with another person by typing comments into a "relay" device. The caller types his message into the TDD machine, and the message is then transferred across standard telephone lines to the recipient's TDD machine and displayed on the recipient's TDD video screen. The recipient sends response messages in the same manner. *Rendon v. Valleycrest Productions, Ltd.*, 2002 WL 1331541, *5 (11th Cir. 2002).

The *Irvine* court noted that the statue referred only to the "initiation" of a prohibited call, not the completion of one. 770 N.E.2d at 1118. As the court made clear, "[There is no language in the statute requiring that a conversation take place." *Id.* The court went even further, noting that "the mere ringing of the phone could constitute a violation." *Id.* According to the court,

> when the telephone rings, the intrusion into the home and the seizing of the telephone line is the same. In fact, an argument can be made that when the telephone rings and no one is on the other end, the recipient is even more disturbed and inconvenienced than if a sales person is at the other end of the line.

Id.[6] Acacia's interpretation of the word "call" cannot not survive the clear precedent established by *Irving* or the sound reasoning the court employed to reach its legal conclusions. The court of appeals was persuaded by the *Irvine* decision. [Pet. App. 11a - 12a]

4. The Court Of Appeals Correctly Ruled That Acacia Made A "Call"

The court of appeals resorted to well-established rules of statutory construction to determine its meaning. Because the purpose of the statute is to regulate the "receipt automated telephone calls," the court of appeals concluded (for the reasons set forth in the Opinion) that the word call means "an attempt to communicate by telephone ... even if the attempt does not present the potential for a two-way voice intercommunication." [Pet. App. 12a] As the court of appeals correctly noted in the Opinion,

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6. Of course, the *Irvine* court's holding that a "call" does not require any communication at all (let alone a "two-way voice communication") when a prohibited call is made by an automatic dialing system logically applies to all sections of the TCPA.

> [I]t is the act of making a call, that is, of attempting to communicate to a cellular telephone number using certain equipment, that the TCPA prohibits. Whether the call had the potential for a two-way real time voice communication is irrelevant. Accordingly, we hold an attempt to communicate by telephone constitutes a call under the TCPA even if the attempted communication does not present the potential for two-way real time voice communication.

[Pet. App. 12a]

V. The Issue Of Class Certification Is Not Before This Court

Acacia's concerns (more aptly fears) about class certification and the potential size of any resulting judgment [*see* Petition at 9] has absolutely nothing to do with any issue before this Court. Class certification has not been decided and no legitimate basis exists for citing this unresolved issue as a reason why the Petition should be granted.

VI. The CAN-SPAM Act

The passage of the CAN-SPAM Act, 15 U.S.C. §§ 7701-7713, twelve years after the TCPA went into effect does not help Acacia.[7] The United States Supreme Court has

7. The CAN-SPAM Act, which became effective on January 1, 2004, was enacted to protect consumers from unwanted commercial e-mail, known colloquially as "spam." It imposes a number of restrictions on the sending of commercial e-mail, defined as messages that have as their primary purpose a commercial advertisement or a promotion of a commercial product or service. The CAN-SPAM Act also contains a section concerning unwanted messages to wireless devices, such as cellular telephones. Specifically, § 14(b), codified as 15 U.S.C. § 7712(b), directed the FCC to issue rules protecting consumers from "unwanted mobile service commercial messages," (Cont'd)

repeatedly warned that "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *Consumer Prod. Safety Comm'n v. GTE Sylvania*, 447 U.S. 102, 117 (1980). Further, settled principles of statutory construction generally prevent deducing the intent behind one Act of Congress from implications of a second act passed years later. *Penn Mutual Co. v. Lederer*, 252 U.S. 523, 537-538 (1920). The court of appeals Opinion emphasized both of these legal propositions. [Pet. App. 22a] Because the lower courts did not need to look outside of the TCPA to discern its meaning, and because courts must apply the law in effect at the time they renders their decisions, it would be inappropriate to rely on subsequent legislation.

Moreover, as the court of appeals correctly observed, neither the text of the TCPA nor its legislative history demonstrates that Congress intended the CAN-SPAM Act, and only the CAN-SPAM Act, to apply to unsolicited text messages sent to cell phone users. [Pet. App. 21a] The court of appeals articulated two reasons for its conclusion.

First, "Congress contemplated the CAN-SPAM Act and the TCPA could have dual applicability. Section 14(a) specifically states "'[n]othing in this Act shall be interpreted to preclude or override the applicability of [the TCPA] . . .' 15 U.S.C. § 7712(a)." [Pet. App. 21a] Second,

> although certain members of Congress may have thought the CAN-SPAM Act was the first legislation to attack unwanted text messages sent to wireless devices, their perceptions, stated years after the passage of the TCPA, fail to demonstrate

(Cont'd)
or "MSCMs." An MSCM is a "commercial electronic mail message that is transmitted directly to a wireless device that is utilized by a subscriber of commercial mobile service (as such term is defined in [47 U.S.C. § 332(d)(1) (2004) in connection with such service." 15 U.S.C. § 7712(d).

> the TCPA was inapplicable to the text messages Acacia delivered to Joffe. None of them mentioned the TCPA and none of them expressed any opinion about its applicability to text messages.

[*Id.*]

VII. The TCPA' Ban On The Use Of Automatic Telephone Dialing Systems For Sending Text Messages To Cell Phones Comports With The First Amendment

According to Acacia, if the Court concludes that the text messages Acacia sent to Mr. Joffe's cell phone are covered by the TCPA, then the statute infringes on its right to free express under the First Amendment. No TCPA cases support this proposition. However, the leading TCPA case on point — *Moser v. FCC*, 46 F.3d 970 (9th Cir. 1994)— is *dispositive* of the constitutional issues before the Court.

A. *Moser* Is Directly On Point and Controlling

In *Moser*, an association of automated telemarketers brought an action against the Federal Communications Commission ("FCC"), challenging the Constitutionality of the provision of the TCPA prohibiting the use of automated telephone dialing systems to deliver voice recorded messages. Noting that because the TCPA does not require the FCC to distinguish between commercial and noncommercial calls, the court stated that the Act should be the statute should be analyzed as a content-neutral time, place, and manner restriction. *Id.* at 973. A time, place and manner restriction will survive a First Amendment challenge so long as the restrictions "are justified without reference to the content of the restricted speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." *Id.* at 973.

Notably, the *Moser* defendant conceded both the government's significant interest in residential privacy and whether the TCPA's curb on telemarketing advances that interest. *Moser*, 46 F.3d at 974. The defendant did so for good reasons. The Ninth Circuit independently noted that "Congress accurately identified automated telemarketing calls as a threat to privacy." *Id.* at 974. According to the court, Congress had found that calls using automated devices were "more of a nuisance and a greater invasion of privacy than calls placed by 'live' persons' because such calls cannot interact with the customer except in preprogrammed ways and do not allow the caller to feel the frustration of the called party . . ." *Id.* at 972 (quoting S. Rep. No. 102-178, 102d Cong., 1st Sess. (1991)). The court also noted that Congressional findings are entitled to a "great deal of deference." Concluding that the restrictions in the TCPA leave open many alternative channels of communication, the court held that the TCPA does not run afoul of the First Amendment. *Id.*

The rationale of the Ninth Circuit court of appeals is well reasoned and persuasive. Moreover, it represents the leading case, precisely on point, on the issue of the constitutionality of the ban against the use of automatic telephone dialing systems to make prohibited phone calls.

B. The Relevant Portion Of The TCPA Is "Narrowly Tailored" To Further An Important Government Interest

1. The Protected Interest

Acacia conveniently ignores what is clearly the most significant interest identified by Congress — the right to be free from unwanted, invasive, and annoying telephone calls. The concerns articulated by the drafters of the TCPA appearing below are illustrative and compelling:

> Unlike other communications media, the telephone commands our instant attention. Junk mail can be

> thrown away. Television commercials can be turned off. The telephone demands to be answered.

137 Cong. Rec. S18317-01.

As shown above, Senator Hollings referred to this type of intrusion as "telephone terrorism." Mr. Justice Banders described the "right to be let alone" as "the most comprehensive * * * and the * * * (one) most valued by civilized men." *Olmstead v. United States*, 277 U.S. 438, 478, (1928) (dissenting opinion). And, as *Moser* makes clear, the government has a significant interest in protecting consumers against this very type of privacy invasion.

The court of appeals also recognized that cell phones have "permeated American life, and have replaced traditional 'land line' telephones in many homes and business." [Pet. App. 27a] Further describing the significant government interest which the TCPA serves, the court stated that,

> People keep their cellular phones on their person at nearly all times: in pockets, purses, and attached to belts. Unlike other modes of communication, the telephone commands our instant attention. While junk mail may be thrown away unopened, and television commercials turned off, the telephone demands to be answered. In protecting the privacy of cellular telephone subscribers from automated callas, the TCPA serves a significant government interest.

[Pet. App. 27a]

Acacia further states that "the recipient of a text message on a cellular telephone hardly feels called upon to engage in any sort of conversation, or even to hear the speaker's message at all . . ." [Petition at 16] This baseless contention is similar to what Acacia urged with the court of appeals, when it stated that "a text message [does not] necessarily

interfere even minimally with a person's ability to be 'left alone' . . . [because] cellular telephone handsets can easily be set such that no alert tone or vibration is triggered by the receipt of a text message." As demonstrated below, the interference with a person's right to be left alone is very severe.

Cell phones allow users to communicate through two-way voice communication or text messages. People often need to leave open channels of communication even when they are in an environment where cell phone calls are not permitted. SMS text messaging fulfils that need. The ability to switch to an "alert" mode for incoming SMS text messages may signal an emergency or other extremely urgent situation requiring the recipient's immediate attention. Being inundated with promotional messages such as those sent by Acacia, even when a call phone is switched to an alert mode with regard to the receipt of SMS text message calls, substantially interferes with a person's ability to be left alone. The interference is arguably more severe because the recipient is forced to see if the incoming call is truly an emergency or just another spammer like Acacia delivering its unwanted messages over and over again.

Contrary to Acacia's contentions [Petition at 16-17], the Supreme Court has recognized that "in the privacy of the home * * * the individual's right to be left alone plainly outweighs the First Amendment right of the intruder." *FCC v. Pacifica Found*, 438 U.S. 726, 748 (1978) The case upheld an FCC ruling that prohibited the daytime broadcast of indecent language.

2. The Speech Restriction Is "Narrowly Tailored"

Acacia erroneously asserts that Congress has "actually *taken* a narrower and less speech-suppressing approach in the CAN-Spam Act." [Pet. at 17 (emphasis in original)] According to Acacia, under the CAN-SPAM Act, cell phone users will be able to regulate the receipt of wireless commercial text messages by either giving prior consent to their receipt of such messages, or electronically signaling their desire to stop receiving such

messages. [Pet. at 8] However, Acacia conveniently overlooks the fact that the ban against using automatic telephone dialing system to make calls to cell phones is not prohibited if the telemarketer obtains the prior consent of the called party. *See* 47 U.S.C. § 227(b)(1)(A). And while this section of the TCPA does not exempt calls if the recipient "signal[s] a desire to stop receiving such messages," there is no evidence that this technology was available when the TCPA was enacted in 1991. Thus, Acacia is wrong when it asserts that the CAN-SPAM Act is less restrictive than the TCPA.

The court of appeals correctly concluded that, "[B]y prohibiting only those calls from automatic dialing systems, Congress narrowly tailored the TCPA to achieve this goal [government interest can be served by some less-speech-restricted alternative] in a way not substantially broader than necessary." [Pet. App. 28a]

C. The TCPA Leaves Open Alternative Channels Of Communications

Finally, contrary to Acacia's contention, the TCPA leaves open many alternative channels of communications. As the *Moser* court made clear,

> [T]he restrictions in the Act leave open many alternative channels of communication, including the use of taped messages introduced by live speakers or taped messages to which consumers have consented, as well as all live solicitation calls. That some companies prefer the cost and efficiency of automated telemarketing does not prevent Congress from restricting the practice.

46 F.3d at 975. The court of appeals reached the same conclusion. [Pet. App. 28a]

CONCLUSION

Petitioners have not established any compelling reasons for this Court to grant the Petition. Therefore, Respondent respectfully requests that the Petition be denied.

Respectfully submitted,

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